1997

State of Utah v. Craig Fisher : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff, vs. CRAIG FISHER, Defendant.	Case No. 970137-CA Trial Court Case No. 941600017

BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF ABUSE OR NEGLECT OF A DISABLED CHILD, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-110, IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR GARFIELD COUNTY, STATE OF UTAH, THE HONORABLE K.L. MCKIFF PRESIDING

E. KENT WINWARD #5562
2411 Kiesel Ave. Suite 306
P.O. Box 1827
Ogden, Utah 84402-1827
(801) 392-8200

Attorney for Appellant

Christine Soltis
Assistant Attorney General
Criminal Appeals Division
Heber Wells Building
160 E 300 S 6th Floor
P.O. Box 140854
Salt Lake City, UT
84114-0854

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff, vs. CRAIG FISHER, Defendant.	Case No. 97-0137 Trial Court Case No. 941600017

BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the court of appeals by provisions of U.C.A. §78-2a-3(2)(f).

NATURE OF THE CASE

Defendant was charged with Abuse or Neglect of a Disabled Child, a third degree felony, in violation of U.C.A.§ 76-5-110. Following a jury trial, defendant was convicted of Abuse or Neglect of a Disabled Child, in the Sixth District Court, in Garfield County, the Honorable K.L. McKiff presiding. The defendant was sentenced according to statute. The district court then stayed the execution of the sentence and place the defendant on probation on certain terms and conditions which included a term of incarceration.

Defendant appeals the judgment and sentence.

STATEMENT OF ISSUES

1. Is the evidence sufficient to support the appropriate definitions of "disabled child" and "caretaker"? The issue was preserved in the trial court (Transcript "T" 950-1).

2. Did the district court err in not ruling that §76-5-110 is constitutionally vague? The issue was preserved in the trial court (T 951).

3. Did the district court err in not reducing the offense to misdemeanor child abuse under the *Shondel* doctrine? The issue was preserved in the trial court (T 951).

4. Did the district court err in submitting the case to the jury on alternative theories without safeguards which would require the jury to reach unanimous agreement on a theory of criminal responsibility? The issue was preserved in the trial court (T 1161-3).

STANDARDS OF REVIEW

For all four issues presented in this brief, the standard of review is a correction of error standard. *See*, e.g., *Forbes v. St. Mark's Hosp.*, 754 P.2d 933, 934 (Utah 1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The texts of the following authorities are set forth in the addendum: Utah Code Ann. §76-5-110, §76-5-109 and §62A-3-301.

STATEMENT OF THE CASE

Craig Fisher was a nineteen year old employee of Northstar Expeditions, Inc. ("Northstar"), a wilderness program for troubled youth. He was employed by Northstar in November of 1993 (T 1047). He received minimal training. At the time of the alleged neglect or abuse, he was not trained in CPR or first aid. He did not receive that training until April of 1994 (T 1049). He signed a standard form "Provider Code of Conduct", outlining the behavior

expected with regards to the troubled teens ("clients") of Northstar (T 1052).

In March of 1994, Craig Fisher was a counselor for the "primitive" section of Northstar. Northstar had several sections: A-team (acclimation), primitive, handcarts and llamas (T 1097, 179-180). The primitive section involved teaching wilderness survival skills and hiking through the Escalante desert with the clients. (T 179-180). The primitive section had three advisors for the clients (T 632). During March, 1994, the number of Northstar clients in the primitive section grew from 5 to 7 (T 636). The primitive section took the clients, such as Aaron Bacon, into the Escalante desert for several weeks with little or no contact with the outside world. These teenage clients did not have maps, compasses, and were not told where they were -- in part to prevent runaways (T 648). The clients had no access to telephones, radios, transportation or other human beings, with the exception of Northstar personnel or with encounters with other campers or hikers. They were approximately 50 to 60 miles from the nearest town (Escalante) and were kept in the dark about the direction of the town and how to get there. The clients and to some extent the field staff (who had radios and maps) were reliant on Northstar for providing food and other necessities (T 668-9, 777). When a client tried to escape, they were found and returned to the group (T 1074).

Food was rationed and provided to the clients and staff weekly at designated locations known as food drops (T 184, 669). The menus and portions for all clients were approved by state regulators (T 488-9). The evidence at trial showed that Craig Fisher played no role in establishing the amount of food, the menus or where the food would be dropped off (T 227). Craig Fisher was in a supervisory role that influenced some of the food intake (T 1127).

Clothing and shelter were provided by Northstar pursuant to State regulations (T 228).

The evidence at trial showed that Craig Fisher did not provide any clothing or equipment to any of the clients (T 228).

Northstar contracted with the parents of Aaron Bacon to provide food, shelter, clothing and medical care for Aaron Bacon (T 152). Craig Fisher never entered into such a contract (T 163).

Aaron Bacon was a normal, intelligent, skinny sixteen year old boy when he entered into Northstar. He was a gifted writer (T 145). He was physically capable (T 153). His parents had had difficulties with Aaron's marijuana use, so he was enrolled in Northstar (T 147). Aaron was given a physical exam on March 7, 1994 in which he was pronounced normal and healthy (T 506, 508). At that time, Aaron was 5'10" tall and weighed 131 pounds (T 508). On March 11, 1994, Aaron entered into the primitive section (T 635).

The hierarchy of Northstar was organized as follows in March of 1994: Lance Jagger and William Henry were the owners (T 185). Brent Brewer was the field support staff directly over the primitive section (T 825). Eric Henry provided back-up to the primitive staff (T 188). Georgette Costigan was back-up driver for the llama group (T 188). Sonny Duncan was the head staff member in the primitive group (T 229). Craig Fisher and Jeff Howenstien were the other two field staff (T 229). Craig Fisher, initially had the assignment as Aaron Bacon's staff member (T 636). The responsibilities included preparing a weekly written report for the main office (T 637). All major decisions by the field staff were to be cleared with the main office (T 227, 237-8).

The first two days of the primitive section were known as "Impact". The State regulations provide for a two day fast for all of the clients of the program. At the conclusion of

Impact, the clients receive their first food drop (one week's ration of food) (T 205-6). Also, at the conclusion of Impact, the clients received a can of peaches to break the fast (T 651). A few initial minor incidents occurred with Aaron Bacon during the first few days of primitive. Aaron said he was fatigued and the field staff went through the motions of taking his blood pressure to assure him he was alright (T 649). None of the staff members knew how to utilize a blood pressure cuff at the time (T 896). Aaron and another client slid and fell down some slick rock and got scraped. The field staff treated and cleaned the wounds (T 656).

On March 15, 1994, Aaron and another client dropped their packs and supplies and refused to carry them. The entire group continued on without the packs for a short distance and met with Brent Brewer that evening and informed him of what had happened. A written incident report was prepared. The clients all received a full food drop, including Aaron Bacon, that evening. The entire group slept grouped together in connected sleeping bags and blankets in what was called a "burrito" (T 755-6). The purpose of the burrito was to discourage clients from running, since they were camped right next to a road. It also provided shelter for Aaron Bacon and the other client without sleeping bags, since they had left their packs behind (T 757).

The next morning, Eric Kiest, another client, ran from the program. Much of the morning was spent searching for Eric (T 1074). The group headed back towards the place where Aaron and the other client had dropped their packs and retrieved the packs on March 17, 1994 (T 664). On or about March 18, 1994, the entire group became wet when passing through a narrow, water-filled canyon (T 665). An evaluation was filled out by Craig Fisher on behalf of Aaron Bacon on March 18. The evaluation cited Bacon's difficulties in conforming to the program, including his unwillingness to hike and participate (T 1092-3). Every two weeks or so, the field staff would

alternate going back to town for twenty four hour breaks. On March 21, Craig Fisher was on his break in Escalante. He was not with the primitive group for the next twenty four hours (T 1080).

At the same time as Craig's return on the evening of March 22, the clients received a food drop from Brent Brewer, who had transported Craig. Craig was instructed by Brent Brewer to have a "cold camp." Cold camp meant that unless the clients started a fire with a bow drill, they would not be allowed to use the fire to cook with. The purpose was to show the importance of survival skills and the consequences if you are unable to perform fundamental safety skills. This left the clients unable to start a fire the option to eat the food which did not require cooking. (T 1078-9).

On March 23, 1996, while hiking, Aaron Bacon and another client again dropped their packs and supplies. The three field staff members, which included Craig Fisher, radioed for guidance from the main office. They were directed to instruct the clients that the consequences of leaving their packs would be the inaccessibility to their food rations and sleeping bags. If the client still refused to carry the pack, then the field staff were told to proceed without the packs (T 1083).

As a result of this directive from Northstar, Aaron Bacon went for the next two days without any of the food he had been provided earlier. He was left to forage prickly pear and other edible plants. He was given ample water and vitamin supplements every day. For shelter on the nights of the 23rd and 24th, Aaron and the other boy who had dropped his pack were sandwiched in between other boys inside the shelter to keep warm (T 1083-5). He did not have his sleeping bag and the nighttime temperatures dipped below freezing (T 498). Medical testimony stated that under those circumstances hypothermia may result and be harmful to the

well-being of the individual who did not have shelter (T 811-2).

On March 25, 1994, Lance Jagger and William Henry, the owners of the company arrived. They provided wool blankets for Aaron and Gerry Winkler. The wool blankets were two blankets sewn together to create a sleeping bag (T 697-8). Aware of the situation with Aaron, they had him continue to forage for his food. Lance Jagger and William Henry also instructed the field staff to not allow Aaron and Gerry to sleep in the shelter, since they had dropped their portion of the shelter with their packs (T 928). Craig Fisher and the other two field staff were concerned about Aaron and Gerry being warm and had the two boys sleep by the fire. Craig Fisher also slept outside the shelter on the woodpile whenever Aaron and Gerry were not inside, because of his concern for their well being (T 775, 1137).

On the morning of the 26th, Jeff Howenstien prepared a weekly report in which he states his concerns about Aaron. Jeff had taken over as Aaron's counselor, since Craig and Aaron did not always see eye to eye (T 770-1). Jeff and Craig took food from another student and gave it to Aaron to eat (T 776). They were concerned about the length of time Aaron had been without food. That evening, Craig left on his next 24 hour break (T 777). On the evening of the 26th and upon returning to Escalante, he called William Henry and asked that Aaron be removed from primitive and placed back in A-team because of his attitude and health. He was told to make sure Aaron eats and that Aaron would remain until the end of primitive in approximately one week (T 1140).

On March 27, 1994, two Los Angeles Police Department detectives visited the primitive group on a separate matter. Sergeant Patrick Findley testified at trial that he visited with all the boys in the primitive group and saw no signs of abuse or neglect. Sergeant Findley identified

Bacon as 5'8" tall and about 130-140 pounds. No other testimony was presented about Aaron Bacon's weight at that time. Craig Fisher was not present during this visit. He returned to camp late on March 27, 1996 (T 1041). From the 28th until he died, field staff, including Craig Fisher, made sure that Aaron ate every meal with the group (T 1101).

The medical evidence stated that deprivation of food and shelter would be harmful and dangerous to someone in Aaron's condition (T 805). The number of days Aaron Bacon went without food remains disputed, but he certainly went without food for a portion of the time in primitive. The medical testimony confirmed that the appropriate response for the staff when someone was going without food or shelter would be to feed and shelter them (T 817-8).

On March 30, 1994, Sonny Duncan left the camp and went to visit the llama group which was nearby. Craig was given the radio (T 1107-8). He made radio contact with Georgette Costigan and asked her to come and check out Aaron Bacon (T 1108). Georgette Costigan is an EMT (T 955). She spoke with Aaron, felt his forehead and gave him a piece of Craig's cheese. She asked him if he could hike. Aaron said yes and hiked into camp. Costigan agreed to have him picked up in the morning if he wasn't feeling better (T 963-4). Craig Fisher was not in a position to make a diagnosis of a perforated ulcer (T 818). Craig Fisher contacted Georgette Costigan, the nearest medical personnel available while he was in the wilderness with no transportation and several other teenage clients (T 961-2).

The evening of March 30, 1994, Aaron, Jeff and Craig sat around the campfire while the others were in bed. Craig told Aaron that he was not going to die and that everything would be alright. They examined his stomach to see if they could find the cause of the pain (T 1112-4).

On March 31, Aaron's condition deteriorated rapidly. He was picked up by the llama

group and the primitive group continued on (T 1115-6). Aaron was in the truck ready to go back into town when he convulsed and died of a perforated ulcer (T 334-5). The undisputed medical evidence was that the ulcer would not have limited his physical performance until the ulcer perforated, no more than two days before he died (T 1010). The evidence was also very clear that a perforated ulcer would be difficult or impossible for a non-doctor, nineteen year old boy to diagnosis and treat (T 818).

SUMMARY OF ARGUMENTS

The statute upon which the prosecution is based was interpreted improperly by the State and the district court. The doctrine of *ejusdem generis* requires the reversal of the charges against the defendant, since the State's definition of "disabled child" and "caretaker" did not comport with the scope of the statute.

Alternatively, the State's definitions are overbroad and unconstitutionally vague.

The broad definitions by the State, require a reduction in the offense from a third degree felony to a class B misdemeanor under the equal protection clause of the Constitution and *State v. Shondel.*

Finally, the district court erred in allowing the jury to deliberate on factual theories that could not legally support a conviction, depriving the defendant his right to a unanimous jury verdict.

ARGUMENT

POINT I

THE EVIDENCE WILL NOT SUPPORT A CONVICTION

"One of the fundamental rules of statutory construction is that the statute should be looked at as a whole and in light of the general purpose it was intended to serve; and should be so interpreted and applied as to accomplish that objective. In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness." *State v. Jones*, 735 P.2d 399, 402 (Utah Ct. App. 1987) (quoting *Andrus v. Allred*, 17 Utah 2d 106, 404 P.2d 972, 974 (1965)).

A. AARON BACON WAS NOT A DISABLED CHILD.

Aaron Bacon was not a disabled child as contemplated by Section 76-5-110 of the Utah Code. Aaron was a normal intelligent, healthy sixteen year old boy. The statute defines disabled child as follows:

> "Disabled child" means any person under 18 years of age who is impaired because of mental illness, mental deficiency, physical illness or disability, or other cause, to the extent that he is unable to care for his own personal safety or to provide necessities such as food, shelter, clothing and medical care.

The gravamen making this offense a felony is abuse or neglect of someone who cannot defend themselves because of internal deficiencies or illness. The statute sets forth three different categories of "disabled child" — (1) mental, (2) physical and (3) other.

i. Aaron Bacon did not suffer from mental illness or deficiency.

Aaron Bacon did not suffer from any mental illness or deficiency. In fact, Jeff Howenstien, one of the field staff, testified that Aaron's vocabulary was far superior to his own

(T 762). Aaron's mother testified about Aaron's ability as a writer and a published poet (T 145, 168)

ii. Aaron did not suffer from physical illness or disability as required by statute.

Once again, Aaron Bacon did not suffer from any physical illness or disability as contemplated by the statute. Aaron was an active and physically able young man, skateboarding for miles and miles in the Arizona heat. (T 153-4). Aaron did suffer from ulcer disease (T 818). The physical disabilities from the disease were dealt with in the testimony of Dr. Rothfeder and were uncontroverted. Dr. Rothfeder testified that physical performance would not be limited until someone with ulcer disease had become acutely ill. Up until that time the illness would not preclude physical activity (T 1008). The physical illness that resulted in his death only "disabled" Aaron for a period of not more than 48 hours immediately prior to his death (T 1010).[1]

iii. Aaron was not disabled under the statute's catch-all "other cause" provision.

The State, in arguing the case, relied on the "other cause" portion of the definition, claiming that Aaron's mere presence in the program made him unable to care for his personal safety. In closing arguments counsel for the State reiterated this position to the jury:

> As in the North Star Wilderness Program structure Aaron Bacon was disabled under this definition from the time that he began the program in that he was unable to provide for his own necessities. Now a normal adolescent in civilization is probably able to provide for his own necessities, especially nutrition. If nothing else happens, he could go out and find some kind of food. But in this circumstance, especially after they start hiking away from any of the roads, any of the areas that are civilized, the kids truly are dependent on North Star and its employees for every single item, every necessity that they have. (T

[1]The actions relating to the treatment of Aaron Bacon after his illness became apparent are dealt with more fully in the argument on Jury Unanimity.

1185).

The legal fallacy of this argument is that the "other cause" provision is not in keeping with the mental and physical disabilities contemplated in the statute. The doctrine of *ejusdem generis* prevents the State from creating such a broad definition of "disabled child." The Court of Appeals discussed the doctrine in *State v. Serpente*, 768 P.2d 994 (Ut.App. 1989) in interpreting the gross lewdness statute. The court held:

> This doctrine provides that "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." Black's Law Dictionary 464 (5th ed. 1979). . . . We similarly find that an "act of gross lewdness" as it appears in § 76-9-702.5, refers to an act of "equal magnitude of gravity" as those acts "specifically set forth in the statute," namely, the exposure of genitals or private parts, masturbation, or trespassory voyeurism.

Id. at 997.

The definition of "disabled child" must be of equal magnitude and type as the disability contemplated earlier in the statute. The type of disability contemplated by the statute is an organic, rather than an environmental disability. The fact that the State has not complied with the doctrine of *ejusdem generis* in arguing for an environmental cause of Aaron's disability is best illustrated by examining an individual who is truly not organically disabled under the statute. For purposes of argument, assume that the case is the abuse or neglect of a normal, healthy sixteen year old girl. The girl's parents lock her in the basement and deprive her of food. It is clearly a case of abuse and neglect. The equivalent of the State's argument is that by locking the sixteen year old in the basement, she has become environmentally disabled. This would not be the case.

For the State to remain logically consistent, everyone from Scoutmasters to state juvenile

corrections officers would all have to be dealing with environmentally disabled children. The difficulty of the definition becomes even more complex when the age of the victim is lowered, because the younger the child the less able they are to care for themselves environmentally. According to the State's definition of disabled, at some point every child would be disabled under this statute. When is every child disabled — thirteen years of age, eleven, ten, eight, six or three?

The scope contemplated by the legislature in defining "disabled" is further illustrated by the history of Section 76-5-110. The statute was originally drafted in response to problems at the American Fork Training School for handicapped children and adults. The statute was created by utilizing the definition of "disabled" in Section 62A-3-301 relating to the abuse or neglect of a disabled adult. Since that time Section 62A-3-301 has been further modified by amendments in 1996. The amendments added the following language: *"to the extent that he lacks sufficient understanding or capacity to make or communicate informed decisions concerning his person, or"* [2] The lack of understanding in the definition of "disabled adult" is organic. Likewise, the general type or magnitude of the disability contemplated by Section 76-5-110 is an organic incapacity, rather than an environmental incapacity, as argued by the State. The mental and physical defects are organic. The extent of these organic incapacities must be of a severity sufficient to render the child "unable to care for his own personal safety or to provide necessities such as food, shelter, clothing and medical care."

---

[2]The Amendment Notes for Section 62A-3-301 read as follows: "Subsection (5) [definition of disabled adult] deleted chronic drug use and intoxication from the list of impairments, inserted the language about lack of capacity, and added the language beginning "without which"; substituted "disabled or elder" for "disabled" throughout the section." This is another indication that the definition of disabled indicates a lack of capacity, rather than external impairment.

The doctrine of *ejusdem generis* requires that the disability contemplated in Section 76-5-110 be of the same magnitude and type and requires a reversal of the conviction.

B. CRAIG FISHER WAS NOT A CARETAKER AS DEFINED IN §76-5-110.

Craig Fisher was not a "caretaker" of Aaron Bacon as required by the statute. Again the state is left to rely on the "other" portion of the caretaker definition. Again the doctrine of *ejusdem generis* is applicable. Only a "caretaker" can be guilty of Abuse or Neglect of a Disabled Child as found in Section 76-5-110 of the Utah Code. "Caretaker is defined in Section 76-5-110(1)(B) as follows:

> (B) "Caretaker" means:
>
> (i) any parent, legal guardian, or other person having under his care and custody a disabled child; or
>
> (ii) any person, corporation, or public institution that has assumed by contract or court order the responsibility to provide food, shelter, clothing, medical and other necessities to a disabled child.

Craig Fisher was not the parent or legal guardian of Aaron Bacon. Northstar contracted for the responsibility of providing necessities for Aaron Bacon (T 152). Craig Fisher did not enter into such a contract (T 163). The only remaining provision of the statute is "other person having under his care and custody a disabled child."

Applying the doctrine of *ejusdem generis* to the "other person" definition, Craig Fisher is not a caretaker as defined by the statute.[3] The common trait contained in all the other types of caretakers in the statute is legal obligation. Craig Fisher did not have "care and custody" of Aaron Bacon in the same sense that the legally obligated parents, legal guardians, court ordered parties or contracting parties would have. In fact, all major decisions relating to the care and

---

[3] Based on the fact that Aaron Bacon was not a disabled child, the statute would exclude Craig Fisher as a caretaker, since the disability is incorporated into the definition.

custody of Aaron Bacon had to be cleared with Craig Fisher's superiors at Northstar.[4] Once again, the State has had to expand definitions to attempt to shove the square peg of the facts into the round hole of the statute.

POINT II

§76-5-110 IS UNCONSTITUTIONALLY VAGUE

The counterpart argument to the doctrine of *ejusdem generis* is the argument that §76-5-110 is unconstitutionally vague. The terms "disabled child" and "caretaker" must be given a specific enough meaning to withstand a constitutional challenge. If the State's expansive definitions are adopted, the ultimate result would be a felony statute that denies the defendant his due process rights under the statute. *See*, *State v. Serpente* at 997.

---

[4] The State had Blaine Fisher on the stand to testify about procedure at Northstar for the field staff. Applicable portions of his testimony include the following:

Q All right. The field staff would not make any medical decisions about these kids; is that right?

A Um, as far as like cuts or things like that, minor things, yeah, we would take care of those. But as far as anything that would be considered beyond the normal, that would be left up to the backup people to come in because they were EMT's. They could come out and look at them. They were the ones that arranged for hospital visits and to see the doctors. (T 227) . . .

Q Would that include just not — or refusing to carry it and just leaving it by the side of the trail?

A Um, from my understanding, um, if a student so chooses to get rid of their gear, it's their choice.

Q And who would have to approve of that choice? - Would the field staff approve that choice?

A Anything of that nature anything of that beyond the norms was always reported to a backup person or to the field office there.

Q And approved by the field office?

A Correct. (T 237-8).

The procedure was followed by Craig Fisher both times Aaron dropped his pack (T 755-6 and 1083), when the camp was visited by the owners (T 928), when Craig was concerned for Aaron's well being and contacted William Henry (T 1140), and lastly, the day before Aaron's death when he contacted Georgette Costigan (T 1107-8).

POINT III

THE *SHONDEL* DOCTRINE REQUIRES LOWERING THE OFFENSE TO A MISDEMEANOR

The third prong in the argument relating to the over-broad definitions given "disabled child" and "caretaker" by the State is an equal protection argument, set forth in *State v. Shondel*, 453 P.2d 146 (Utah 1969). "[T]he equal protection of the laws requires that they affect alike all persons similarly situated." *Id.* at 147. When separate laws provide disparate penalties for the same criminal conduct, equal protection of the law requires the Court to insure that one law and one penalty will apply to all similarly situated criminal defendants. *Id.* at 147. In *Shondel*, the court applied the rule of lenity in the context of overlapping statutes, stating, "[W]here there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser." *Id.* at 148.

The *Shondel* doctrine is based not only on principles of equal protection of the law, but also on constitutional proscriptions against vague legislation. " The well-established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. A fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation." *Id.* at 148.

In *State v. Bryan*, 709 P.2d 257 (Utah 1985), the Utah Supreme Court noted that the equal protection principles underlying the *Shondel* doctrine should be applied to limit prosecutorial discretion. The court stated,"[A] prosecutor should not have the freedom to choose between charging either a felony or a misdemeanor when the two crimes have exactly the same

substantive elements. We agree that situation would deny defendant and others in his class equal protection of the laws, '**if the same identical facts** may be used in prosecutions under two completely integrated statutes, one a misdemeanor and the other a felony.' [*State v Twitchell*, 333 P.2d at 261 (emphasis by the *Bryan* court.)

Applying the forgoing principles in the instant case leads to the conclusion that the neglect or abuse of a disabled child charge should be reduced to charge misdemeanor child abuse. Assuming that the State's apparent factual theory is correct, the State does not need to prove any element beyond its burden in proving misdemeanor child abuse to prove the third degree felony, neglect or abuse of a disabled child. Under both statutes, the State need only prove that Mr. Fisher recklessly, knowingly or intentionally imposed or permitted a physical injury on Aaron Bacon while Aaron was in Mr. Fisher's care or custody. Utah Code Ann. §§76-5-109 and 110.[5]

While it might be argued that the State must prove additional facts in order to classify Aaron Bacon as a disabled child to obtain the felony conviction, the statutory definition of disabled child is so broad as to encompass every child, including those that are completely healthy and normal. See Utah Code Ann. §76-5-110(1)(c) ("'Disabled Child' means any person under 18 years of age who is impaired because of mental illness, mental deficiency, physical illness or disability, **or other cause**, to the extent that he is **unable to care for his own personal safety or to provide necessities such as food, shelter, clothing, and medical care**.") (emphasis added). Given this broad language, the State need prove no more to obtain a felony conviction for abuse or neglect of a disabled child, than it must prove to obtain a misdemeanor child abuse

[5]Copies of the entire statutes are contained in the addendum.

conviction.

The facts alleged in the instant case could constitute the third degree felony offense of abuse or neglect of a disabled child, or the misdemeanor offense of child abuse. The prosecution should not have the discretion to select Mr. Fisher for felony prosecution when by statute, the conduct alleged against him could constitute a misdemeanor offense. This Court should apply the rule of lenity and reduce the charge to misdemeanor child abuse. *E.g. Shondel.*

POINT IV

THE COURT ERRED BY SUBMITTING THE CASE TO THE JURY ON ALTERNATIVE THEORIES OF CRIMINAL RESPONSIBILITY WITHOUT SAFEGUARDS TO INSURE UNANIMITY ON A VALID THEORY.

Even if the State's theories designating Aaron Bacon as a "disabled child" and Craig Fisher as his "caretaker" were valid, the verdict nevertheless cannot stand because there was no safeguard in the manner in which the jury was instructed to insure that the jurors unanimously agreed on the acts that constituted abuse or neglect.

Defendant is aware of *State v. Russell*, 733 P.2d 162 (Utah 1987), where the Utah Supreme Court affirmed a second-degree murder conviction although the trial court had refused to instruct the jury that there must be unanimous agreement on which of three alternative *mens rea* the defendant possessed, i.e., intent to kill, intent to cause serious bodily injury, or "depraved indifference". The rule set out in *Russell* has application only where a statute provides various modes by which a specific offense may be committed. *See generally*, Annotation: Jury Unanimity--Mode of Offense, 75 A.L.R.4th 91.

In the instant case, we are concerned with a specific *actus rea*, not alternate *mens rea* -- the act of abuse or neglect. The element instruction, 17A, gave the jury leeway to find Craig

Fisher abused or neglected Aaron Bacon between March 11 and March 31, 1994. The trial court ruled on the instruction as follows:

> First, with respect to the time frame, March 11th to March 31st, that is simply the time frame in which the offense is alleged to have occurred. You may argue that the defendant was absent a couple of days, but I don't think including the whole time period as being the time frame within which the abuse or neglect is alleged to have occurred is prejudicial in any way. . . .
> The instruction I've written on the face there of "Not given", it's an instruction that was based or at least cites the state case of State v. Russell. I reviewed that case and my response is that the abuse or neglect is alleged to have occurred over several days and there's been evidence regarding many different acts or omissions and as I read State v. Russell, we should not or could not compel the jury to focus on specific individual acts or specific individual omissions to the exclusion of others and require unanimity regarding that level of specificity.
>
> I think they're entitled to consider the time frame which is not a long time frame, in any event, and they're entitled to consider whether the evidence during that time frame has established the offense charged.

(T 1162, 1163). The trial court misreads *State v. Russell* since *Russell* assumes that all the alternatives are legally viable. *Russell* does not apply where the prosecution relies on alternative "wrongs" to prove a single offense or a single element of an offense. *See Woertman v. People*, 804 P2.d 188 (Colo. 1991); *Covington v. State*, 703 P.2d 436 (Alaska App. 1985).

The prosecution argued a cumulative set of wrongs allegedly committed by Craig Fisher. The jury unanimity argument becomes valid if any of those alleged wrongs are not legally viable. If that is the case, the defendant is placed at risk of having the jury decide his case without the constitutional protection of unanimity.

Consider Justice Stewart's observations in *State v. Tillman*, 750 P2.d 546 (Utah 1987), 585-88 (Durham, J., concurring and dissenting), id. at 591 (Zimmerman, J., concurring and dissenting); id. at 577-80 (Stewart, J., concurring in the result):

> The importance of preserving the principle of jury unanimity as to all "elements of an offense" can hardly be overstated. To dilute that principle by allowing jurors to

> disagree among themselves at to separate, alternative elements of the crime, even thought they agree ont he general conclusion that the crime... has in face been committed, is to lose the value of the synergistic effect of jurors acting as a group in reconstructing the facts and applying the law. Nonunanimity permits a jury to refrain from coming to grips with determining precisely what the defendant did and then deciding whether that meets the legal standards that define the elements of the crime.
>
> Nonunanimity as to alternative elements of a crime can also deprive a defendant of a defense to the charge. [I]f a defendant urges a defense that is valid as to one alternative element but not to another and the jury splits on which alternative the defendant committed, the jury is not forced to decide the validity of the defense.
>
> ....Finally, if the principle of jury unanimity is relaxed, all the vaunted protections of proof beyond a reasonable doubt will be threatened. requiring jury unanimity as to the crime itself only, rather than each element of the crime would permit a jury to render inconsistent and potentially irrational verdicts because they may be based on conflicting and even inconsistent determinations of the facts. That is no small erosion of a fundamental principle of our criminal justice system.

Id. at 578.

In *State v. Johnson*, 821 P2.d 1150 (Utah 1991), the Utah Supreme Court held that in a criminal case a general verdict of guilty cannot stand if the state's case was premised on more than one factual or legal theory of the elements of the crime and any one of these theories is flawed or lacks a requisite evidentiary foundation. In such circumstance, it is impossible to determine whether the jury unanimously agreed on all of the elements of a viable theory of the offense.

Several theories were argued by the State to the jury that are not legally sufficient. Any one of these may have been utilized in whole or in part by the jury in reaching their verdict and we have no assurance that the verdict was not based upon such a theory. For purposes of argument three of these theories are set forth below.

1. "Impact" was included as part of the abuse or neglect.

The State begins closing arguments by arguing to the jury that Aaron Bacon begins his

stay at Northstar by participating in the Impact phase of the program. The argument was as follows:

> You'll notice, of course, on March 11th and 12th during the Impact Phase he actually did eat breakfast on March 11th, so he did have one meal that morning. And then we start the 48 hours of fasting. So in effect he went two days with no meals. Before or on the 13th they broke the Impact Phase and he has a can of peaches to eat. That was part of the North Star program as authorized under North Star rules. And we are not arguing that that was abuse or neglect on Mr. Fisher. However, as you consider it with connection with everything else that was done in the next several days, it becomes significant.

The gist of the State's argument was the two day fast was part of the abuse or neglect allegedly committed by Craig Fisher. While the prosecution may not overtly argue the fast was abuse or neglect, the instructions allow the jury to consider those two days as part of the overall picture. With no safeguards in the instructions, the jury was free to base its decision on those two days or utilize those two days to reach a consensus that abuse or neglect had occurred.

2. Days were included in which Craig Fisher was not present.

The State presented a chart to the jury indicating their interpretation of the evidence and the particular days upon which Aaron Bacon went without food. All these days were argued to the jury (T 1188-9). It was undisputed that Craig Fisher was not present for 48 hours, yet the jury was again allowed to use two additional days — that alone would be legally insufficient — to utilize in reaching a consensus over whether abuse or neglect had occurred.

3. The final two days of Aaron's life are included even though Aaron is being fed and given medical treatment.

The events of the last two days of Aaron Bacon's life are comprised of Craig Fisher making sure Aaron eats (T 1101), calling the EMT to check on Aaron (T 1108) and making

arrangements to get Aaron out of the primitive group (T 963-4). This evidence coupled with the concurrence of the medical experts that it would be impossible for a layperson to diagnose an ulcer (T 818), presents no legally sufficient basis for finding abuse or neglect against Aaron Bacon by Craig Fisher. A failure to diagnose cannot be extrapolated into abuse or neglect, unless of course it is just part of a "big picture" that includes a long laundry list of alleged wrongs.

Inasmuch as it is impossible to determine which theory of the State's many theories the jury relied upon, if any one of the theories of abuse or neglect is not legally or factually viable, the defendant's conviction cannot stand.

CONCLUSION

Based on the foregoing it is respectfully submitted that the defendant's conviction should be reversed and the matter dismissed based upon the State's failure to make a prima facie case. Alternatively, in the event the court shall determine that the State in fact made a prima facie case, the conviction should nevertheless be reversed and treated as a misdemeanor under the *Shondel* doctrine and a new trial ordered on the grounds that the Court failed to insure jury unanimity.

RESPECTFULLY SUBMITTED THIS 6TH DAY OF APRIL, 1998.

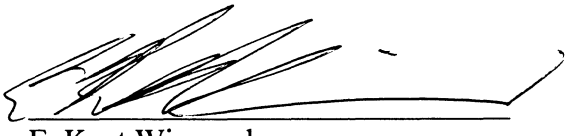
E. Kent Winward
Attorney for Defendant and Appellant

DELIVERY CERTIFICATE

I do hereby certify that on the 7th day of April, 1998, I did personally deliver a true and correct copy of the above and foregoing document to the following:

Christine Soltis
Assistant Attorney General
Criminal Appeals Division
Heber Wells Building
160 E 300 S 6th Floor
P.O. Box 140854
Salt Lake City, UT
84114-0854

Dated this 7th day of April, 1998.



E. Kent Winward

ADDENDUM

76-5-110. Abuse or neglect of disabled child.

(1) As used in this section:

(a) "Abuse" means physical injury, as that term is defined in Subsection 76-5-109(1)(b), or unreasonable confinement.

(b) "Caretaker" means any person, corporation, or public institution that has assumed by contract or court order the responsibility to provide food, shelter, clothing, medical, and other necessities to a disabled child.

(c) "Disabled child" means any person under 18 years of age who is impaired because of mental illness, mental deficiency, physical illness or disability, or other cause, to the extent that he is unable to care for his own personal safety or to provide necessities such as food, shelter, clothing, and medical care.

(d) "Neglect" means failure by a caretaker to provide care, nutrition, clothing, shelter, supervision, or medical care.

(2) Any caretaker who abuses or neglects a disabled child is guilty of a third degree felony.

History: C. 1953, 76-5-110, enacted by L. 1988, ch. 39, § 1.

Compiler's Notes. - The defined terms in this section were alphabetized by the compiler under the direction of the Office of Legislative Research and General Counsel.

76-5-109. Child abuse.

(1) As used in this section:

(a) "Child" means a human being who is 17 years of age or less.

(b) "Physical injury" means an injury to or condition of a child which impairs the physical condition of the child, including:

(i) a bruise or other contusion of the skin;

(ii) a minor laceration or abrasion;

(iii) failure to thrive or malnutrition; or

(iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in this section.

(c) "Serious physical injury" means any physical injury or set of injuries which seriously impairs the child's health, or which involves physical torture or causes serious emotional harm to the child, or which involves a substantial risk of death to the child, including:

(i) fracture of any bone or bones;

(ii) intracranial bleeding, swelling or contusion of the brain, whether caused by blows, shaking, or causing the child's head to impact with an object or surface;

(iii) any burn, including burns inflicted by hot water, or those caused by placing a hot object upon the skin or body of the child;

(iv) any injury caused by use of a deadly or dangerous weapon;

(v) any combination of two or more physical injuries inflicted by the same person, either at the same time or on different occasions;

(vi) any damage to internal organs of the body;

(vii) any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function;

(viii) any injury which creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ;

(ix) any conduct which causes a child to cease breathing, even if resuscitation is successful following the conduct; or

(x) any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life.

(2) Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:

(a) if done intentionally or knowingly, the offense is a felony of the second degree;

(b) if done recklessly, the offense is a felony of the third degree;

(c) if done with criminal negligence, the offense is a class A misdemeanor.

(3) Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows:

(a) if done intentionally or knowingly, the offense is a class A misdemeanor;

(b) if done recklessly, the offense is a class B misdemeanor;

(c) if done with criminal negligence, the offense is a class C misdemeanor.

(4) Criminal actions under this section may be prosecuted in the county or district where the offense is alleged to have been committed, where the existence of the offense is discovered,

where the victim resides, or where the defendant resides.

History: C. 1953, 76-5-109, enacted by L. 1981, ch. 64, § 1; 1992, ch. 192, § 1.

Amendment Notes. - The 1992 amendment, effective April 27, 1992, subdivided and rewrote Subsection (1)(b), substituting the present language for former similar provisions and transferring the rest to Subsection (1)(c); in Subsection (1)(c), designated the existing provisions as Subsection (1)(c)(viii), except for a reference to "substantial risk of death" now in the introductory language, and added the rest of the subsection; in Subsections (2) and (3), substituted "or" for "and" after "having the care"; and made stylistic changes.

Cross-References. - Child abuse and neglect prevention and treatment, § 62A-4-401 et seq.
Reporting requirements, § 62A-4-503.

62A-3-301. Definitions.

As used in this part:
(1) "Abuse" means:
(a) attempting to cause, or intentionally or knowingly causing physical harm or intentionally placing another in fear of imminent physical harm;
(b) physical injury caused by criminally negligent acts or omissions;
(c) unlawful detention or unreasonable confinement;
(d) gross lewdness; or
(e) deprivation of life sustaining treatment, except:
(i) as provided in Title 75, Chapter 2, Part 11, Personal Choice and Living Will Act; or
(ii) when informed consent, as defined in Section 76-5-111, has been obtained.
(2) "Bodily injury" means physical pain, illness, or any impairment of physical condition.
(3) "Caretaker" means any person, corporation, or public institution that has assumed by relationship, contract, or court order the responsibility to provide food, shelter, clothing, medical, and other necessities to a disabled or elder adult.
(4) "Counsel" means an attorney licensed to practice in this state.
(5) "Disabled adult" means a person 18 years of age or older who is impaired because of mental illness, mental deficiency, physical illness or disability, or other cause, to the extent that he lacks sufficient understanding or capacity to make or communicate informed decisions concerning his person, or is unable to care for his own personal safety or provide necessities such as food, shelter, clothing, or medical care, without which physical injury or illness may occur. A person who is, in good faith, under treatment solely of a spiritual means, through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, and by an accredited practitioner thereof shall not be considered a disabled or elder adult for that reason alone.
(6) "Elder abuse" means abuse, neglect, or exploitation of an elder adult.
(7) "Elder adult" means a person 65 years of age or older.
(8) "Emergency" means that a disabled or elder adult is at risk of death or immediate and serious harm to himself or others.
(9) "Emotional or psychological abuse" means deliberate conduct that is directed at a disabled or elder adult through verbal or nonverbal means, and that causes the disabled or elder adult to suffer emotional distress or to fear bodily injury, harm, or restraint.
(10) "Exploitation" means exploitation of a disabled or elder adult as that offense is described in Subsection 76-5-111(4).
(11) "Informed consent" means the same as that term is defined in Section 76-5-111.
(12) "Neglect" means:
(a) the failure of a caretaker to provide habilitation, care, nutrition, clothing, shelter, supervision, or medical care;
(b) a pattern of conduct by a caretaker, without the disabled or elder adult's informed consent, resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating, or other services necessary to maintain minimum physical or mental health; or
(c) the failure or inability of a disabled adult to provide those services for himself.
(13) "Protected person" means a disabled or elder adult for whom the court has ordered protective services including disabled or elder adults for whom emergency protective services are

established under the provisions of this part.
(14) "Protective services" means services provided by the offices of Adult Protective Services within the division, including investigation of allegations of abuse, emotional or psychological abuse, neglect, or exploitation, and other services provided either by voluntary agreement or as authorized by court order to assist disabled or elder adults in need of protection, for the purpose of discontinuing and preventing further abuse, neglect, or exploitation. Those services may include the services of guardian and conservator provided in accordance with Title 75, Utah Uniform Probate Code, when no other agency or individual can appropriately provide the service. The services provided by the offices of Adult Protective Services shall be consistent, if at all possible, with the accustomed lifestyle of the disabled or elder adult.

History

History: C. 1953, 62A-3-301, enacted by L. 1988, ch. 1, § 54; 1990, ch. 183, § 32; 1992, ch. 278, § 1; 1996, ch. 130, § 1.
Administrative Rules. - This section is implemented by, interpreted by, or cited as authority for the following administrative rule(s): R510-1, R510-302, R510-400.
Annotations
Amendment Notes. - The 1996 amendment, effective April 29, 1996, added Subsections (1), (6), (7), (9), (11), and (12)(b); deleted former Subsections (4), (8), (9), and (13) defining "criminal negligence," "intentionally," "knowingly," and "recklessly," and redesignating the other subsections accordingly; in Subsection (3) deleted "life-sustaining" before "necessities"; in Subsection (5) deleted chronic drug use and intoxication from the list of impairments, inserted the language about lack of capacity, and added the language beginning "without which"; substituted "disabled or elder" for "disabled" throughout the section; in Subsection (12)(c) added "or inability"; rewrote Subsections (10) and (14); and made stylistic and related changes.

COLLATERAL REFERENCES
Am. Jur. 2d. - 40 Am. Jur. 2d Hospitals and Asylums §§ 14, 36.
C.J.S. - 7 C.J.S. Asylums and Institutional Care Facilities § 14.
A.L.R. - Licensing and regulation of nursing or rest homes, 53 A.L.R.4th 689.